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"Get out Now or Risk Being Taken out by Force": Judicial Review of State Government Emergency Power following a Natural Disaster

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"GET OUT NOW OR RISK BEING TAKEN OUT BY FORCE": JUDICIAL REVIEW OF STATE GOVERNMENT EMERGENCY POWER FOLLOWING A NATURAL DISASTER

INTRODUCTION

In the early morning of August 29, 2005, Hurricane Katrina began its disastrous attack on the Gulf Coast. New Orleans was initially thought to have narrowly missed a certain disaster,[1] but a day later the waters of Lake Pontchartrain broke through their levees and swept into the City of New Orleans. Approximately eighty percent of the city was submerged under water.[2]

The destruction was monumental. Reports circulated about entire neighborhoods that were reduced to "a community of houseboats" when viewed from above.[3] "These are the scenes of a dying city," one article started, "an elderly woman dead in a wheelchair outside the convention center, a note on her lap bearing her name. A horrified family telling tales of pirates commandeering rescue boats at gunpoint. Corpses left rotting in broad daylight. Angry crowds chanting for the television cameras "'We're dying!' or simply 'Help!'"[4]

The public disorder was perhaps the most shocking storyline. One article described the social dynamic just days after the hurricane:

> Many people with property brought out their own shotguns and sidearms [to protect their property]. Many without [prop-

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[1] Joseph B. Treaster & Kate Zernike, *New Orleans Escapes a Direct Hit—One Million Lose Power*, N.Y. TIMES, Aug. 30, 2005, at A1. *See also* Andrew C. Revkin, *With Few Warning Signs, an Unpredictable Behemoth Grew*, N.Y. TIMES, Aug. 29, 2005, at A13 (describing the strength of Hurricane Katrina and how it formed).

[2] Joseph B. Treaster & N. R. Kleinfield, *New Orleans Is Inundated as 2 Levees Fail; Much of Gulf Coast Is Crippled; Toll Rises*, N.Y. TIMES, Aug. 31, 2005, at A1.

[3] *Id.*

[4] James Dao, Joseph B. Treaster & Felicity Barringer, *New Orleans Is Awaiting Deliverance*, N.Y. TIMES, Sept. 2, 2005, at A15.

> erty] brought out shopping carts. The two groups have moved warily in and out of each other's paths for the last three days, and the rising danger has kept even some rescue efforts from proceeding.[5]

Looting was rampant in the city. Colonel Terry Ebbert, the New Orleans's Director of Homeland Security, described the looters as not just "individuals looting . . . [but] large groups of armed individuals."[6] The situation at evacuation centers bordered on anarchy; soldiers at the Superdome were "overwhelmed by the enormity of the task of getting the people on buses" and had trouble "distinguishing [between] degrees of need."[7]

Following the devastation of Katrina, much of the nation's attention was directed at the response, or lack thereof, from the federal government.[8] The Mayor of New Orleans, C. Ray Nagin, pointed to

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[5] Felicity Barringer & Jere Longman, *Owners Take Up Arms as Looters Press Their Advantage*, N.Y. TIMES, Sept. 1, 2005, at A16.

[6] Treaster & Kleinfield, *supra* note 2.

[7] Dao, Treaster & Barringer, *supra* note 4.

[8] *See* Elisabeth Bumiller, *Democrats and Others Criticize White House's Response to Disaster*, N.Y. TIMES, Sept. 2, 2005, at A16; Dao, Treaster & Barringer, *supra* note 4; Todd S. Purdum, *Across U.S., Outrage at Response*, N.Y. TIMES, Sept. 3, 2005, at A1. The local and federal governments' roles following a natural disaster are often misunderstood. Many believe that the federal government steps into the resulting chaos with complete control and authority over all facets of recovery and restoration of order. *See* Rebecca M. Kahan, *Constitutional Stretch, Snap-Back, and Sag: Why* Blaisdell *Was a Harsher Blow to Liberty Than* Korematsu, 99 NW. U. L. REV. 1279, 1283 n.18 (2005) (describing FEMA as a "miniature dictatorship" when "state government cannot muster a sufficiently broad and coordinated relief effort"). One misconception following the destruction of Hurricane Katrina was the view that the federal government was supposed to take control of the looting through military operations. In reality, however, the state controls whether the federal government ever gets involved in an emergency response to a natural disaster. Before the federal government may take any action, the state must first request the federal government's assistance. *See, e.g.*, 10 U.S.C. § 331 (2000) (providing federal relief from insurrections against state governments); 42 U.S.C. § 5170 (2000) (obtaining federal relief under major disaster assistance programs); 42 U.S.C. § 5173(b) (2000) (providing for debris removal by the federal government); *see also* David G. Tucker & Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 862 & n.207 (2001) (discussing the process of declaring a "major disaster" under the Stafford Act). Once the state requests the federal government's assistance, the state remains at the forefront in directing, controlling, and organizing the response, while the federal government lends assistance primarily through funding and coordinating relief efforts. Further, the President is explicitly prohibited from using the military to perform civil law enforcement unless the civil disobedience rises to the level of "insurrection" and a state legislature or governor requests federal assistance. *Compare* 18 U.S.C. § 1385 (2000) (prohibiting, generally, the use of military forces on American soil) *with* 10 U.S.C. § 331 (allowing the President to use armed forces to suppress an insurrection against a state government). The prohibition on the use of military personnel, however, does not apply to the National Guard acting under the command of the state's governor. *See* John J. Copelan, Jr. & Steven A. Lamb, *Disaster Law and Hurricane Andrew—Government Lawyers Leading the Way to Recovery*, 27 URB. LAW. 29, 38 (1995). As a result, the state governor controls the military enforcement of civil law following natural disasters. After Hurricane Katrina, Louisiana requested federal assistance, but Louisiana Governor Kathleen Babineaux

the federal government's delayed response as the main reason for the continued chaos. In one interview Mayor Nagin exclaimed: "Don't tell me 40,000 people are coming here . . . . They're not here. It's too doggone late. Now get off your asses and do something, and let's fix the biggest god-damn crisis in the history of this country."[9]

Lost in the debate over the delay of the federal government's response was the method of the local government's response. On September 7, 2004, Mayor Nagin was quoted stating that the residents of New Orleans who had remained within the city's boundaries must "[g]et out now or risk being taken out by force."[10] Mayor Nagin's September 7 evacuation order came as the water was beginning to recede. The evacuation was inclusive of the entire city and applied to citizens that were holding out in neighbourhoods that had not flooded.[11] Many of the holdouts could not understand the reason for the mayor's order and refused to leave. They claimed that enforcement of the mayor's order would violate their constitutional rights.[12]

In addition, the National Rifle Association (NRA) filed a lawsuit alleging that Mayor Nagin had violated its members' constitutional right to keep and bear arms when he ordered police officers to take firearms away from anyone who remained in the city.[13] In the same lawsuit, Plaintiff Buell O. Teel alleged that, while on Lake Pontchartrain, Sheriff's officers boarded his boat and took his lawfully possessed rifles.[14]

The scope of governmental emergency power has come into the limelight in the years following the terrorist attacks on 9/11. Scholars and courts alike have weighed in on whether the policies and procedures adopted by President George W. Bush's administration in the

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Blanco retained control of the Louisiana National Guard and rejected a proposal from the President to engage the military in restoring order. *See* Michael Luo, *The Embattled Leader of a Storm-Battered State Immersed in Crisis*, N.Y. TIMES, Sept. 8, 2005, at A26; Scott Shane & Eric Lipton, *Government Saw Flood Risk, but Not Levee Failure*, N.Y. TIMES, Sept. 2, 2005, at A1.

[9] Susan Saulny, *Newcomer Is Struggling To Lead a City in Ruins*, N.Y. TIMES, Sept. 3, at A13.

[10] Cain Burdeau, *New Orleans Mayor Threatens Forced Evacuations as Flood Waters Slowly Seep Away*, ASSOCIATED PRESS DATASTREAM, Sept. 7, 2005, 08:39:21 EST.

[11] *See* Alex Berenson & Sewell Chan, *Forced Evacuation of a Battered New Orleans Begins: Officials Warn of Disease and Fire Risks*, N.Y. TIMES, Sept. 8, 2005, at A1; Alex Berenson, *One by One, Reluctant Holdouts Obey Mayor's Order To Leave Their Homes*, N.Y. TIMES, Sept. 8, 2005, at A25.

[12] *See* Berenson & Chan, *supra* note 11; Berenson, *supra* note 11; Alex Berenson, *Holdouts on Dry Ground Say, "Why Leave Now?,"* N.Y. TIMES, Sept. 9, 2005, at A1.

[13] Complaint, Nat'l Rifle Ass'n of Am. v. Nagin, Civ. No. 05-04234 (E.D. La. Sept. 22, 2005), available at http://www.saf.org/new.orleans.lawsuit/complaint.declaratory.injunctive.relief.pdf.

[14] *Id.* ¶ 19; *see also* Berenson, *supra* note 12 ("To reduce the risk of violent confrontation, the police began confiscating firearms on Thursday, even those legally owned.").

"war on terror" are constitutional. A discussion of the virtues of alternative methods of review, although a monumentally important issue and task, is beyond the focus of this Note. This Note simply sets out the method that courts have applied when reviewing challenges to emergency actions, and determines whether the distinctions between federal and state government emergency power support either a stricter or more lenient level of review for state government emergency actions following natural disasters. Perhaps in the future, legal scholarship will resolve the question of what the proper standard of review is for emergency actions. The focus of this Note, however, is an analysis of the realities and intricacies of the standard that courts currently use to evaluate the use of emergency power, without any judgment on the propriety of that standard. Ultimately, this Note concludes that the courts apply a deferential two-pronged test, and the distinctions between federal and state governments do not justify a different standard of review for state government emergency actions.

In Part I, this Note addresses the standard that courts apply to emergency actions: what it is, where it came from, and how it has been applied to both federal and state government actions. Part II addresses whether the standard is properly applied with equal effect and force to state action following natural disasters. Finally, in Part III, this Note applies the standard to Mayor Nagin's evacuation and firearms orders.[15] This Note concludes, in Part III, that Mayor Nagin's orders, with one fact-specific exception, would be sustained under the standard of review that is currently applied to federal government emergency actions.

I. THE PROCESS-REASONABLENESS TEST

An evaluation of emergency power involves two questions. First, does the government have the emergency power it seeks to employ? And, if yes, should the government use its power?[16] In a previous article, Professors Samuel Issacharoff and Richard H. Pildes described the courts' approach to challenges of emergency actions taken by the President in times of war as "process-based, institutionally-

[15] This section draws its information from news reports and is limited by the lack of access to the benefits of litigation discovery.

[16] Professor Oren Gross divides this question into what he terms the "obvious question" and the "tragic question." The "obvious question" seeks to determine what will promote the greatest good, while the "tragic question" considers the moral consequences of the act. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1100 (2003) (citing Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1005 (2000)).

oriented (as opposed to rights-oriented)."[17] The courts, they argued, "have tied their own role to that of the more political branches; where both legislature and executive endorse a particular trade-off of liberty and security, the courts have accepted that judgment."[18]

Issacharoff and Pildes' presentation of the process-based approach simplifies the inquiry. They simply ask whether both of the political branches authorized the action. Their presentation entirely omits the question of whether the government should use the power. However, when courts review emergency measures jointly authorized by the political branches, they do address, although through a highly deferential lens, the reasonableness of the action. An analysis of the reasonableness of the governmental action is, at the least, in the spirit of asking whether the government should use the power.

Although the courts have never explicitly stated the standard that they apply, it is clear from the cases that judicial review of emergency powers involves a two-pronged test. First, there is a Process Prong in which the courts look to whether the politically accountable branches of the government have authorized, consented, ratified, or otherwise approved the challenged emergency action. Second, there is a Reasonableness Prong in which the courts consider the reasonableness of the action. The courts' reasonableness analysis does not involve a means-ends analysis of whether the action was narrowly tailored or reasonably related to the claimed goal. Instead, the courts' reasonableness analysis focuses on the government's motivation and addresses: 1) whether an emergency actually existed;[19] and 2) whether the action was pretextual, or done in bad faith.[20]

The Process Prong, as Issacharoff and Pildes describe it, is the decisive factor in some challenges. When the government's action fails the Process Prong of the analysis, the Supreme Court does not reach the Reasonableness Prong.[21] Likewise, when there has been bilateral

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[17] Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 297 (2004).

[18] *Id.* at 333.

[19] *See* Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996), *rev'd on other grounds*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) ("[W]hether there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order.") (quoting Moorhead v. Farrelly, 727 F. Supp. 193, 200 (D.V.I. 1989)); 16A C.J.S. *Constitutional Law* § 628 & nn.2-4 (2005).

[20] *See Avino*, 91 F.3d at 109 ("[W]hether the [executive's] actions were taken in good faith") (quoting *Moorhead*, 727 F. Supp. at 200).

[21] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *Ex parte* Endo, 323 U.S. 283 (1944); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

endorsement from the political branches, no court has ever found the endorsed governmental action unreasonable.[22]

The Reasonableness Prong hinges on the government's motivation. If an emergency does not exist, or if the government does not claim the existence of an emergency, then, by definition, the governmental action falls outside the scope of an emergency power and any action taken under a claimed emergency power is unreasonable.[23] Courts give deference to the government's determination that an emergency exists, but this is ultimately a factual question for the courts.[24] The actual existence of an emergency weighs heavily on a court's consideration of pretext or bad faith. All of the Supreme Court's major emergency power cases have occurred during uncontested emergencies.[25]

Emergencies present difficult situations. The courts generally leave the policy matters to the politically accountable branches and do not conduct a means-ends analysis. A reality of this approach is that the politically accountable branches are allowed to make poor choices. The only issue for the courts is whether those poor choices had an ulterior motivation that went beyond addressing the emergency. As a result, the Reasonableness Prong takes on a seemingly perfunctory appearance because, in the face of an actual emergency, the Court has said that it is not for the Court to make the policy determination of the correct course of action.[26]

The majority of this section outlines the development of the Process-Reasonableness test, and its application in some of the Supreme Court's more significant cases. Toward the end of this section, this Note focuses on how the courts apply the Process-Reasonableness test to state government actions following natural disasters before moving on to the discussion of the distinctions between federal and state emergency powers in Part II.

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[22] This is largely due to the fact that all of the Court's major emergency power cases occurred during uncontested emergencies. *See infra* note 25.

[23] *See Milligan*, 71 U.S. at 140 (Chase, C.J., concurring).

[24] *See* 16A C.J.S. *Constitutional Law* § 628 & nn.2-4 (2005).

[25] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (during the United States' war with Afghanistan); *Endo*, 323 U.S. 283 (during World War II); Korematsu v. United States, 323 U.S. 214 (1944) (during World War II); Hirabayashi v. United States, 320 U.S. 81 (1943) (during World War II); *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (during the reconstruction of the South); *Milligan*, 71 U.S. 2 (pertaining to events that occurred during the Civil War).

[26] *See Hirabayashi*, 320 U.S. at 93 ("[I]t is not for any court to sit in review of the wisdom of [the political branches'] action or substitute its judgment for theirs."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."); *Milligan*, 71 U.S. at 141 (Chase, C.J., concurring) ("It was for Congress to determine the question of expediency."); *see also McCardle*, 74 U.S. at 514 ("We are not at liberty to inquire into the motives of the legislature.").

A. Court Review of Federal Emergency Power

1. The Beginning of the Process Prong

Nearly every discussion of emergency powers in the United States begins with a discussion of *Ex parte Milligan*[27] and *Ex parte McCardell*.[28] These two cases are linked because inasmuch as *Milligan* stands for a rights-based approach to judicial evaluation of emergency power (the civil libertarian position), the ensuing backlash to the *Milligan* decision is credited with producing the Court's recantation and adoption of a process-based approach just two years later in *McCardell*.[29]

In 1862 President Lincoln suspended the writ of habeas corpus, claiming authority under martial law.[30] Congress, responding to Lincoln's actions, retroactively authorized the suspension of the writ, but regulated the process by which habeas corpus could be denied.[31]

During the time that the writ was suspended, Lambdin P. Milligan was tried before a military commission and sentenced to death. Milligan filed a petition for a writ of habeas corpus alleging that the military commission violated the Due Process Clause of the Constitution. The Supreme Court, despite Congress's retroactive authorization to suspend the writ, granted Milligan's petition. The Court's decision was not based on the government's failure to follow the procedure that Congress set out for the suspension of the writ. Instead, the Court focused on the constitutionality of the military commission, and held that "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction" and that "[martial rule] is . . . confined to the locality of actual war."[32]

The most notable aspect of the *Milligan* decision is the Court's broad, rights-based approach to the petition. In the majority's view, the rights reserved to the people by the Constitution were "irrepeal-

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[27] 71 U.S. (4 Wall.) 2 (1866).

[28] 74 U.S. (7 Wall.) 506 (1868).

[29] *See* Issacharoff & Pildes, *supra* note 17, at 306.

[30] *See* Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1399 (1999) ("In September of 1862, Lincoln proclaimed that any person obstructing military enlistment or 'guilty of any disloyal practice affording aid and comfort to rebels' would be subject to 'martial law and liable to trial and punishment by courts-martial or military commissions.' Thus, not only were suspects unable to seek review in civil court through habeas corpus, but they were subject to trial by military procedure for offenses unknown to the civil law.") (internal citations omitted) (citing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 60 (1998)).

[31] *Milligan*, 71 U.S. at 108.

[32] *Id.* at 127.

able law."[33] Civil libertarians know well Justice Davis's oft-quoted passage:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[34]

But it was the majority's broad holding that led to the public's intense criticism of the decision[35] and spurred future commentators to observe that "[n]o justice has ever altered his opinion in a case of liberty against authority because counsel for liberty recited *Ex Parte Milligan*."[36]

Although the judgment in *Milligan* was unanimous, the opinion of the concurring justices, authored by Chief Justice Chase, is prototypical of the Process Prong analysis. In Chief Justice Chase's view, the issue was not a question of individual constitutional rights, but rather a question about the relationship between the political branches.[37] The Chief Justice concurred in the result not because of a rights-based belief that the governmental action was unconstitutional, but because the authorities failed to follow the procedures outlined by Congress to make the writ unavailable to Milligan.

President Lincoln himself explicitly acknowledged the need for joint authorization from the political branches. In a message to Congress explaining the extraordinary measures he had taken, the President stated that his actions were, "whether strictly legal or not . . . ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily

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[33] *Id.* at 120.

[34] *Id.* at 120–21.

[35] Issacharoff & Pildes, *supra* note 17, at 305–06.

[36] *Id.* at 307 (quoting CLINTON ROSSITER WITH RICHARD P. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 35 (expanded ed. 1976)).

[37] *Id.* at 303.

ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."[38]

The view propounded by the Chief Justice, and apparently accepted by President Lincoln, came to the forefront just two years after *Milligan* in the Court's unanimous decision in *McCardell*. William McCardell was a newspaper editor in Vicksburg, Mississippi during the post-Civil War Reconstruction of the South.[39] McCardell was arrested by military authorities and held for trial before a military commission for publishing pro-Confederate articles.[40] McCardell petitioned for a writ of habeas corpus under an act passed on February 5, 1867, conferring appellate review of habeas corpus petitions on the United States Supreme Court.[41] On March 27, 1868, however, prior to the Court's decision, Congress passed an act repealing the Court's appellate review of habeas corpus petitions filed under the February 5 act.[42] The Court held that Congress, through the act of March 27, expressly repealed the Court's jurisdiction to hear McCardell's case and dismissed it. "Thus, the lesson of [the *Milligan* Court's] attempt at an aggressive, rights-based set of constraints on Congress during wartime and its aftermath was that exigent circumstances were ultimately going to be controlled by Congress, not the Court."[43]

As much as *Milligan* is the bulwark of a rights-based approach, *McCardell* represents the renouncement of that approach and the inception of the Process Prong. The *McCardell* Court deferred to Congress's determination of the policy issues and stated that it was "not at liberty to inquire into the motives of the legislature."[44] Subsequently, however, the Court would add the Reasonableness Prong and inquire into the government's motives.

2. *The Reasonableness Prong*

During the turmoil of World War II, the Court decided three of the most controversial decisions in its history—*Hirabayashi v. United States*,[45] *Korematsu v. United States*,[46] and *Ex parte Endo*.[47] Few de-

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[38] Gross, *supra* note 16, at 1110 (emphasis omitted) (quoting Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 429 (Roy P. Basler ed., 1953)).

[39] Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2 of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1497 (2005).

[40] Issacharoff & Pildes, *supra* note 17, at 306.

[41] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 507 (1868).

[42] *Id.* at 508.

[43] Issacharoff & Pildes, *supra* note 17, at 307.

[44] *McCardle*, 74 U.S. at 514.

[45] 320 U.S. 81 (1943).

[46] 323 U.S. 214 (1944).

[47] 323 U.S. 283 (1944).

cisions have been subject to more criticism and disgust than the Court's decisions in *Hirabayashi* and *Korematsu*. As discussed in detail below, the Reasonableness Prong of the Court's analysis was infamously displayed in *Hirabayashi* and *Korematsu*. However, as Professors Issacharoff and Pildes note, "[t]hat conventional account ignores the companion case to *Korematsu*, *Ex parte Endo*, decided the same day as *Korematsu* . . . . For while *Korematsu* upheld as constitutional the initial evacuation order requiring the Japanese to leave the West Coast, *Endo* unanimously held, at the very same time, that the detention of the Japanese was illegal."[48] While *Hirabayashi* and *Korematsu* demonstrated the extreme deference of the Process-Reasonableness test, *Endo* symbolizes the limitations it imposes on the government.

Due to fears of sabotage and espionage following the Japanese attack on Pearl Harbor, President Roosevelt signed Executive Order 9066 authorizing military control of "the right of any person to enter, remain in, or leave" the Western Defense Command.[49] Congress, on March 21, 1942, endorsed Executive Order 9066 by passing a law making it a crime to violate a regulation promulgated under the authority of the order.[50] On March 24, 1942, General John DeWitt, the commanding officer of the Western Defense Command, established a curfew for persons of Japanese ancestry,[51] and started issuing Civilian Exclusion Orders setting the dates and times for all persons of Japanese descent to be excluded from their specified military areas.[52]

Hirabayashi addressed the constitutionality of the curfew order. The Court framed the issue as "whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction."[53] The very framing of the issue was a pronouncement of the Process Prong. To that end, the Process Prong was satisfied when the Court held that "[t]he conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066."[54]

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[48] Issacharoff & Pildes, *supra* note 17, at 311. But see Professor Ackerman's more colloquial evaluation of the *Korematsu* decision as "bad law, very bad law, *very, very* bad law." Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1043 (2004).

[49] Exec. Order No. 9066, 3 C.F.R. 1092 (1942). The Western Defense Command included the states of Washington, Oregon, California, and Arizona. *See* Muller, *supra* note 30, at 1403 & n.19.

[50] Act of Mar. 21, 1943, Pub. L. No. 77-503, 56 Stat. 173 (1942).

[51] Hirabayashi v. United States, 320 U.S. 81, 88 (1943) (citing 7 Fed. Reg. 2543 (Mar. 24, 1942)).

[52] *Hirabayashi*, 320 U.S. at 88.

[53] *Id.* at 91–92.

[54] *Id.* at 91.

The Court, after determining that the politically accountable branches had jointly authorized the curfew, turned its attention to the reasonableness of the curfew at the time it was made.[55] The fact that the United States was at war was not in question,[56] and it was largely a foregone conclusion that the curfew was a reasonable use of the war power. The Court deferred to the judgments of the political branches and held:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[57]

The Court cited several reasons that, in its view, supported the reasonableness of the government's actions and weighed against the presence of pretext.[58] The Court cited the census-like statistic that a large percentage of Japanese citizens in the United States were located in the Western Defense Command.[59] The Court also thought it relevant that "social, economic and political conditions . . . intensified [the] solidarity [of the Japanese citizens]."[60] Next, the Court cited the fact that "approximately 10,000 . . . American-born children of Japanese parentage [were] sent to Japan for all or a part of their education."[61] Finally, the Court gave weight to "the maintenance by Japan of its system of dual citizenship." The Court concluded that all of the above factors gave Congress and the Executive reason to believe that

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[55] In response to Hirabayashi's argument that the curfew should have been applied to all citizens or none, the Court stated that "[w]e think that constitutional government, in a time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have *reasonable* ground for believing that the threat is real." *Id.* at 95 (emphasis added).

[56] After setting out the procedural history of the case, the Court started its factual statement by noting that, "[o]n December 8, 1941, one day after the bombing of Pearl Harbor by a Japanese air force, Congress declared war against Japan." *Id.* at 85.

[57] *Id.* at 93.

[58] Justice Murphy's concurrence in *Hirabayashi* came close to finding the curfew unreasonable. Ultimately, however, Justice Murphy's concurrence serves as the best example of the judiciary's unwillingness to challenge the political branches in times of emergency. *See* Gross, *supra* note 16, at 1034 & n.96. Justice Murphy's concurrence stated that, "[t]oday is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry." *Hirabayashi*, 320 U.S. at 111 (Murphy, J., concurring). In the end, Justice Murphy concluded that the curfew order limited to people of Japanese ancestry only reached "the very brink of constitutional power" and the necessity of the times justified the use of the power. *Id.* at 111–12.

[59] *Hirabayashi*, 320 U.S. at 96 (majority opinion).

[60] *Id.*

[61] *Id.* at 97.

people of Japanese ancestry subjected the area to risk of sabotage and espionage.[62] By considering these facts relevant to its analysis, the Court rejected, although not explicitly, the proposition that the government had a pretextual motive.[63]

The decision in *Korematsu* addressed General DeWitt's relocation orders. The *Korematsu* Court relied heavily on the conclusions and justifications set forth in *Hirabayashi*, and held that the relocation orders were constitutional.[64] The Court acknowledged that "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m."[65] But the Court held that it was "unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast."[66] As mentioned above, the practical effect of *Korematsu* was little more than symbolic[67] in light of the decision of *Endo* on the same day.[68]

Endo addressed the continued detention following the relocation and was undoubtedly an application of the Process-Reasonableness

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[62] *Id.*

[63] The pretext to evacuate the Japanese is detailed in Muller, *supra* note 30, at 1403 n.18, 1411. Professor Muller details the underlying economic and racist motivations associated with the evacuations.

[64] It is noteworthy to mention that the Court found a new reason to support the reasonableness analysis, namely that "[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor." Korematsu v. United States, 323 U.S. 214, 219 (1944). The Court was referring to responses to a four-page questionnaire distributed to all Japanese evacuees. The question at issue read:

> Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and foreswear any form of allegiance or obedience to the Japanese emperor, to any other foreign government, power or organization?

Muller, *supra* note 30, at 1426 (citing EDWARD H. SPICER ET AL., IMPOUNDED PEOPLE 143 (1969)). In relying on this fact as support for the reasonableness of the action, the Court failed to recognize the dilemma faced by both American-born Japanese and Japanese immigrants. The American-born Japanese were "incensed that they were being asked . . . to 'forswear' an allegiance to the Japanese Emperor when they had never sworn such allegiance [to the Japanese] in the first place," and the Japanese immigrants "were understandably reluctant to . . . renounce the only citizenship they had . . . thereby rendering themselves stateless." *Id.*

[65] *Korematsu*, 323 U.S. at 218.

[66] *Id.* at 217-18.

[67] Hopefully the decision symbolizes when the judiciary should increase its scrutiny of the reasonableness of governmental action beyond a tacit acceptance of necessity due to an existing emergency. Otherwise, as Justice Jackson warned, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 246 (Jackson, J., dissenting). The Court's failure, and chief concern expressed by Justice Jackson, in *Korematsu* is the acceptance of any justification or "plausible claim" for the reasonableness of the action. *Id.*

[68] Issacharoff & Pildes, *supra* note 17, at 312 (explaining that "the president, perhaps having been notified that the Court was going to hold the detentions illegal, had already ordered the relocation camps closed the day before Endo was decided.").

test. The Court began its analysis by stating that the Constitution delegated the war power to the Executive and Congress, and "necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully."[69] The Court observed that Executive Order 9066 must be considered in conjunction with the congressional act that ratified it.[70] The Court then concluded that the continued detention of people of Japanese ancestry failed the Process Prong because neither Executive Order 9066 nor Congress' ratification authorized the continued detention of loyal citizens.[71]

The government failed the Process Prong because it conceded that Endo was a "loyal and law-abiding citizen."[72] The government argued that the continued detention was a necessary implication of the continued community hostility toward people of Japanese ancestry.[73] Continued community hostility, however, was neither an explicit nor implicit motivation for the evacuation order. The Court concluded that the government's concession that Endo was a loyal citizen was determinative[74] because the original motivation for the emergency action was the prevention of sabotage and espionage.[75] The Court held that the politically accountable branches had not jointly authorized the continued detention of people of Japanese ancestry for reasons other than preventing sabotage or espionage.[76] Thus, the government's concession of Endo's loyalty undermined her continued detention because it eliminated any concern for sabotage and espionage.

The Court applied the Process-Reasonableness test in each of the Japanese internment cases. The Japanese internment decisions demonstrate the deference accorded the government in the Reasonableness Prong analysis, but they also highlight the Process-Reasonableness test's limitation on governmental actions. While *Hirabayashi* and *Korematsu* more than aptly demonstrate the extreme of the Court's deference under the Reasonableness Prong,[77] *Endo*

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[69] *Ex parte* Endo, 323 U.S. 283, 298–99 (1944).

[70] *Id.* at 298.

[71] *Id.* at 300–01.

[72] *Id.* at 294.

[73] *Id.* at 296–97.

[74] *Id.* at 302 ("The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded.").

[75] *Id.* ("If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens.").

[76] *Id.* at 302.

[77] Professor Gross, in his comprehensive article addressing how the use of emergency powers are and should be evaluated, cited extensive support for his statement that "national

shows that the government's emergency measures are constrained by the motivations of the politically accountable branches. Further, *Endo* demonstrates that the government cannot subsequently extend emergency measures based on ulterior justifications, unless the new justifications are not pretextual and both branches assent.

3. A Modern Application

The decision in *Hamdi v. Rumsfeld* is useful to the discussion here because it shows that the Court continues to implement the Process-Reasonableness test.

Following the attacks of 9/11, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[78]

Yaser Esam Hamdi was born an American citizen, but by 2001 he resided in Afghanistan.[79] Hamdi was originally detained in Afghanistan by the Northern Alliance, who subsequently turned him over to the United States military. After the government learned that Hamdi was a U.S. citizen, they transferred him to Charleston, South Carolina.[80] The government designated Hamdi an "enemy combatant"[81] and maintained that it could detain him indefinitely "without formal charges or proceedings . . . unless and until it makes the determination that access to counsel or further process is warranted."[82] Hamdi peti-

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courts assume a highly deferential attitude when called upon to review governmental actions and decisions." Gross, *supra* note 16, at 1034 & n.96. Of particular note is Judge Learned Hand's criticism that "[the Supreme Court has] not shown themselves wholly immune from the 'herd instinct.'" *Id.* at 1035 n.96 (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921)). Professor Ackerman, however, takes a more cynical view, arguing that "when a real crisis arises, judges can display remarkable flexibility for the interim, while covering their tracks with confusing dicta and occasional restrictive holdings." Ackerman, *supra* note 48, at 1042.

[78] *Id.* at 510 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001)).

[79] *Id.*

[80] *Id.*

[81] The Court, for the purposes of this case, accepted the government's definition of an "enemy combatant" as "an individual who, [the Government] alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." *Id.* at 516 (quoting Brief for the Respondents at 3, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696)).

[82] *Id.* at 510–11.

tioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus.[83]

In the district court, the government submitted an affidavit, known as the Mobbs Declaration, to support its determination that Hamdi was in fact an "enemy combatant."[84] The district court criticized the Mobbs Declaration as "little more than the government's 'say-so,'"[85] and ordered an *in camera* review of the documents that the government relied upon in making its determination. The government opposed the order, and the district court certified the question of "whether the Mobbs Declaration, 'standing alone, is sufficient as a matter of law to allow meaningful judicial review of Hamdi's classification as an enemy combatant.'"[86]

The Supreme Court, keeping with its precedent, implemented the Process-Reasonableness test. First, the Court concluded that Congress, through the AUMF, authorized the detention of "enemy combatants."[87] Second, the Court found that a war did exist, was ongoing,[88] and the government's detention of "enemy combatants" was an action pursuant to the war power. And finally, the Court found that the act of detaining unlawful combatants during wartime was "by 'universal agreement and practice' [an] 'important incident[] of war,'" and therefore met the reasonableness requirement for an emergency measure.[89] Thus, the Court determined, by way of the Process-Reasonableness test, that Congress had authorized the detention, and, in light of the war in Afghanistan, the detention was reasonable.

The Court's analysis in *Hamdi* proves that it continues to apply the same Process-Reasonableness test developed during World War II.

B. Court Review of State Emergency Power

1. The Use of the Police Power at the State Level

The Supreme Court's most famous case involving a state level response to an emergency is *Home Building & Loan Association v.*

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[83] *Id.* at 511.

[84] *Id.* at 512. The Mobbs Declaration stated that interrogation of Hamdi revealed that he was "affiliated with a Taliban military unit" that had surrendered to the Northern Alliance. *Id.* at 512–13.

[85] *Id.* at 513 (quoting Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 535 (E.D. Va. 2002)).

[86] *Id.* at 514 (quoting Hamdi v. Rumsfeld, 316 F.3d 450, 462 (4th Cir. 2003)).

[87] *Id.* at 517 ("[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe . . .").

[88] The Court rejected the argument that the "war on terror" was the conflict at issue and instead relied on the "[a]ctive combat operations against Taliban fighters apparently . . . ongoing in Afghanistan." *Id.* at 521.

[89] *Id.* at 518 (quoting *Ex parte* Quirin, 317 U.S. 1, 28, 30 (1942)).

Blaisdell.[90] The *Blaisdell* decision is the best example of the Court's use of the Process-Reasonableness test to evaluate a state's use of its police power in response to an emergency.

In the midst of the Great Depression, the Minnesota State Legislature enacted the Minnesota Mortgage Moratorium Law.[91] The statute provided temporary relief through court ordered extensions of sales and periods of redemption for mortgagors who were unable to make payments due to the Depression.[92] Through the statute, the legislature declared the Depression an emergency[93] and limited the law's duration to the "continuance of the emergency."[94]

John H. Blaisdell and his wife mortgaged property to the Home Building & Loan Association. Due to the Depression, however, they defaulted on their mortgage and the Home Building & Loan Association subsequently foreclosed on the mortgage.[95] The Home Building & Loan Association purchased the property at a sheriff's sale and the Blaisdell's period of redemption was due to expire on May 2, 1933.[96] The Blaisdells petitioned a county district court for an extension of the period of redemption pursuant to the statute.[97] The district court granted their petition and extended the period of redemption to May 1, 1935.[98] The Association, however, challenged the postponement's constitutionality under the Contract Clause.[99] The Minnesota Supreme Court rejected the Association's challenge and held that the statute was a valid exercise of the state's police power.[100]

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[90] 290 U.S. 398 (1934).

[91] *Id.* at 415–16 (discussing Act of Apr. 18, 1933, 1933 Minn. Laws 514, pt. 2, § 8, ch. 339).

[92] *Id.* at 416 (summarizing Act of Apr. 18, 1933, ch. 339).

[93] *Id.* at 421–24 n. 3 (quoting Act of Apr. 18, 1933, ch. 339).

[94] *Id.* at 416 (quoting Act of Apr. 18, 1933, ch. 339).

[95] *Id.* at 419.

[96] *Id.*

[97] *Id.* at 418.

[98] *Id.* at 420.

[99] U.S. CONST. art. I § 10 cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

[100] *Blaisdell*, 290 U.S. at 420. Interestingly, in a concurring opinion, Justice Olsen of the Minnesota Supreme Court compared the state of emergency caused by the Depression to a natural disaster:

> The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people, and threatens to result in the loss of their homes by many other people in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and Congress has found it necessary to step in and attempt to remedy the situation by federal aid.

Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 340 (Minn.) (1933) (Olsen, J., concur-

The U.S. Supreme Court, in beginning its analysis, observed that "[e]mergency does not create power," and further, that the Constitution's limitations on state power "were determined in the light of emergency and they are not altered by emergency."[101] The Court, in essence, was restricting the state's police power to the same restraints as the federal government's war power by reaffirming the idea that an emergency is merely a justification for the use of an already existing power, and not the impetus for the creation of a new power.[102] So, the question for the Court was whether the statute was an action within the legislature's existing police power.

The Court proceeded through a historical review of the Contract Clause's jurisprudence and concluded that the Contract Clause did not negate a state's police power to control the enforcement of contracts; accordingly, the state retains the power to alter an available remedy so long as the rights secured by the contract are not altered.[103] Thus, the Court concluded that the statute was a valid exercise of the state's police power because it altered the remedy for the breach of the contract, but not the obligation of the contract.

The Court did not need to address the Process Prong because the politically accountable actor was the legislature, and the plain fact that the statute existed resolved any process analysis. The Court framed the remaining issue before it as a challenge to the statute's reasonableness.[104] The Court was careful to note that it does not consider "[w]hether the legislation is wise or unwise as a matter of policy" when reviewing a challenge to the reasonableness of a statute.[105] But the Court did consider the legislature's motivation by looking to the existence of an emergency and who stood to benefit under the statute to determine whether it satisfied the Reasonableness Prong.

The Court held that the Depression created a state of emergency that motivated the legislature to enact the statute.[106] In reaching the factual determination that an emergency did exist, the Court paid deference to the legislature and its express declaration that the Depression created an emergency.[107] Continuing its reasonableness

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ring), *aff'd*, 290 U.S. 398 (1934).

[101] *Blaisdell*, 290 U.S. at 425.

[102] *Id.* at 426 ("[T]he war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency.").

[103] *Id.* at 434–35.

[104] *Id.* at 438 ("The question is . . . whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.").

[105] *Id.* at 447–48.

[106] *Id.* at 444.

[107] *Id.*

analysis, the Court held that the statute "was not for the mere advantage of particular individuals but for the protection of a basic interest of society," and was thus not a pretext.[108] The Court then looked to the statute's temporary nature. The statute expired when the legislature determined that the economic depression no longer existed, which further supported the conclusion that the statue was a reasonable exercise of an emergency power constrained by time and limited to addressing the existing emergency.[109]

The *Blaisdell* decision illustrates the premise that the Court will apply the Process-Reasonableness test to state emergency actions with the same effect and force as it does to federal emergency actions. The Court first established that the police power was the source of authority that the legislature used when enacting the statute, just as the Court identified the federal government's war power as the source of authority for the military commissions in *Milligan* or the Japanese internment in *Korematsu*. The Court then employed the same deferential reasonableness analysis that it employed in the Japanese internment cases discussed above.

The remainder of this section focuses on judicial review of state emergency actions following natural disasters, and how the courts have applied the Process-Reasonableness test under those circumstances.

2. State and Local Use of the Police Power Following Natural Disasters

The number of cases involving challenges to the use of emergency power following a natural disaster can be described as sparse at best. The challenges at issue in the cases described below involve an alleged restriction of freedom of speech pursuant to curfew orders.

i. Hurricane Hugo and the Virgin Islands Curfew

On September 17–18, 1989, Hurricane Hugo struck the Virgin Islands.[110] Hugo caused a significant amount of damage to the infrastructure of the island of St. Croix and enabled a large portion of the island's prison population to escape.[111] Similar to New Orleans following Katrina, "reports of widespread looting and violence were prevalent."[112] The Governor of the Virgin Islands, Alexander Farrelly,

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[108] *Id.* at 445.
[109] *Id.* at 447.
[110] Moorhead v. Farrelly, 723 F. Supp. 1109, 1110 (D.V.I. 1989).
[111] *Id.*
[112] *Id.*

declared a state of emergency on September 21, 1989, and instituted a "nocturnal curfew between the hours of 6 p.m. and 6 a.m."[113] The plaintiff, Jeffrey Moorhead, an attorney, was stopped for violating the curfew. Mr. Moorhead challenged the curfew order and alleged that it violated his individual constitutional rights and was unconstitutionally vague.[114]

Since the plaintiff sought a preliminary injunction, the court conducted a review of the probability that he would succeed on the merits of his claim. Proceeding to the Process Prong of the Process-Reasonableness test, the court's first step was to establish that "[t]he Governor of the Virgin Islands has statutory authority to impose a curfew in an emergency."[115] Specifically, the governor, under the Virgin Islands Territorial Emergency Management Act,[116] has the authority to "'[c]ontrol ingress and egress to and from an affected area [and] the movement of persons within the area' and may '[t]ake any other action [he or she] deems necessary.'"[117] Thus, under the court's process analysis, the legislature and governor jointly authorized the curfew.

The court then considered whether the curfew was "reasonably necessary for the preservation of order."[118] The court observed that "[t]he Governor issued the executive order at a time of grave emergency; the aftermath of Hurricane Hugo,"[119] and the continued devastation "still justif[ied] the nocturnal curfew."[120] Thus, the curfew order was and continued to be reasonable because there was an actual existing emergency.

The court then addressed "whether the executive's actions were taken in good faith and whether there is some factual basis for the decision that the restrictions imposed were necessary to maintain order."[121] The court declined to "define precisely what specific conditions justify continued imposition of the curfew" in order to refrain from infringing on the "broad discretion necessary for the executive to deal with an emergency situation."[122] It did, however,

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[113] *Id.* at 1111.

[114] Mr. Moorhead alleged violations of "his right of freedom of association, freedom of religion under the first and fourteenth amendments, freedom of speech, the due process clause of the fourteenth amendment, [and] his right to interstate travel as guaranteed by the commerce clause." *Id.* at 1111.

[115] *Id.*

[116] V.I. CODE ANN. tit. 23, §§ 1121–1135 (Supp. 1988).

[117] *Moorhead*, 723 F. Supp. at 1112 (quoting V.I. CODE ANN. tit. 23, § 1125(f)(7), (10)).

[118] *Id.* at 1113 (citing United States v. Chalk, 441 F. 2d 1277, 1281 (4th Cir. 1971)).

[119] *Id.*

[120] *Id.* at 1110–14.

[121] *Id.* at 1113–14.

[122] *Id.* at 1114 (citing *Chalk*, 441 F.2d at 1280).

find that the majority of the property damage was taking place at night, and without the aid of electricity or telephones, police response was drastically hindered.[123] Further, the plaintiff did not "conten[d] that the Governor acted in less than good faith in imposing the curfew."[124] With the concession that there was no pretextual motive and there were existing conditions justifying the curfew, the court concluded that the curfew order was reasonable and granted the defendant's motion to dismiss the case.

ii. Hurricane Andrew and the Dade County Curfew

Hurricane Andrew is recognized as one of the most devastating natural disasters in the history of the United States.[125] Prior to Andrew's arrival, the Governor of Florida declared a state of emergency in south and central Florida, and authorized city and county officials to impose curfews.[126] Joaquin Avino, the Dade County Manager, subsequently issued a proclamation establishing a countywide curfew. Residents of Dade County challenged Avino's curfew order and claimed that the curfew violated their federal constitutional rights.

Avino's first defense on summary judgment was that he was acting as an agent of the governor rather than as a policymaker for the county, and was therefore the incorrect party for plaintiff's suit.[127] The district court disagreed, holding that Avino had final decision-making authority to issue the curfew and was not acting at the governor's behest.[128] The district court, in deciding that Avino acted with final decision-making authority, noted that Avino did not have to rely on the authority conferred by the governor's order.[129] Florida law authorized local officials to declare a state of emergency and to impose a curfew.[130]

The court's decision that Avino had the authority to issue the curfew resolved the Process Prong. The Florida Legislature specifically

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[123] *Id.* at 1113.

[124] *Id.* at 1114.

[125] Hurricane Andrew caused approximately twenty-one billion dollars in insured losses. *See* Treaster & Kleinfield, *supra* note 2; TROPICAL PREDICTION CENTER, NATIONAL WEATHER SERVICE, COSTLIEST U.S. HURRICANES 1900-2004 (ADJUSTED), http://www.nhc.noaa.gov/pastcost2.shtml (last visited Sept. 21, 2006) (damage costs adjusted for inflation).

[126] Smith v. Avino, 866 F. Supp. 1399, 1401 (S.D. Fla. 1994).

[127] *Id.* at 1402.

[128] *Id.* at 1403. The court of appeals passed on ruling on the district court's decision that Avino had final decision-making authority, stating "[w]e assume, without deciding, that plaintiffs here are entitled to a decision addressing their concerns about the constitutionality of the curfew." Smith v. Avino, 91 F.3d 105, 107 (11th Cir. 1996), *rev'd on other grounds*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

[129] *Avino*, 866 F. Supp. at 1403.

[130] *Id.*

authorized a county manager to declare a state of emergency and enact a curfew under the state's police power, and so, with the legislature and executive in agreement, the court only had to decide whether the curfew was reasonable. Both the district court and the circuit court applied the following standard:

> [W]hen a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality "is limited to a determination whether the executive's actions were taken in good faith and whether there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order."[131]

The plaintiffs did not challenge the existence of an emergency created by Hurricane Andrew and conceded that the curfew was necessary when it was imposed.[132] Further, they could not produce any evidence that Avino acted in bad faith when implementing the curfew.[133] The circuit court concluded that the plaintiffs' only argument was that the curfew was unreasonable because it should have included an exception for citizens to conduct "necessary activity."[134] Relying on *Korematsu*, the circuit court held that "[i]n an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended"; thus, the plaintiffs' challenge to the reasonableness of the curfew failed.[135]

II. DISTINCTIONS BETWEEN FEDERAL AND STATE USE OF EMERGENCY POWER

The purpose of the preceding discussion was to introduce the Process-Reasonableness test. The following section considers three fundamental distinctions between the federal government's and the state government's emergency actions following natural disasters. The focus of this section is on comparing the circumstances of federal

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[131] *Avino*, 91 F.3d at 109 (quoting Moorhead v. Farrelly, 723 F. Supp. 1109, 1113-14 (D.V.I. 1989)).

[132] *Id.*; *Avino*, 866 F. Supp. at 1405.

[133] *Avino*, 91 F.3d at 109; *Avino*, 866 F. Supp. at 1405.

[134] *Avino*, 91 F.3d at 109.

[135] *Id.* (citing Korematsu v. United States, 323 U.S. 214 (1944)). The "necessary activity" argument is distinguishable from the petitioner's argument in *Endo*. The federal government's justification for the Japanese Interment was its fear of sabotage and espionage. The Court granted Endo's petition because the government's concession that the she was loyal directly undercut its justification. Here, Avino's justification was the need to restore order, and "necessary activity" does not negate or undercut the restoration of order. In other words, order will not be restored by the petitioner's "necessary activity," but in *Endo* the petitioner's commission of sabotage and espionage was prevented by the petitioner's loyalty.

and state emergency power actions. Again, the following discussion does not address what the best standard is for the Court to apply to emergency powers. The question is whether what is good for the goose is good for the gander. This section concludes that the distinctions between federal and state are not a justifiable basis for either a stricter or more lenient standard of review.

A. Police Power v. War Power

The Supreme Court defined the federal government's war power as "the power to wage war successfully," and added that "[i]t embraces every phase of the national defense."[136] There are no precise limits and rules for the implementation and use of war powers.[137] The vagueness of the Court's definition is part of the Process-Reasonableness test's deference to the politically accountable branches' policy decisions.[138] As demonstrated in the cases above, the courts consistently state that they will not inquire into the wisdom of the action nor supersede the judgment of the political branches with that of the judiciary.[139] A more precise definition of the government's power would complicate, if not entirely undercut, the courts' deference.

Similarly, the courts have avoided a precise definition of the state police power. The police power is defined as "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people."[140] The Supreme Court has observed that a state's police power "is a vague one which 'embraces an almost infinite variety of subjects.'"[141] Considering the vast

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[136] Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (citation omitted) (internal quotation marks omitted).

[137] *See Ex parte* Endo, 323 U.S. 283, 298–99 (1944) ("And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully.").

[138] *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 229 (2004) ("The nature of modern emergencies may make a more flexible model attractive, one in which the appropriate legal instruments can be tailored to the actual circumstances. This may be a reason for the more extensive use of the legislative model.").

[139] *Endo*, 323 U.S. at 298–99; *Hirabayashi*, 320 U.S. at 93; Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868); Moorhead v. Farrelly, 723 F. Supp. 1109, 1114 (D.V.I. 1989); *see also* David Dyzenhaus, *Intimations of Legality Amid the Clash of Arms*, 2 INT'L J. CONST. L. 244, 247 (2004) (arguing that under the English common law system, the parliament is sovereign and its use of emergency powers is "subject to the normal parliamentary safeguards of question and debate," thus any judicial inquiry "is, of course, very close to a doctrine of 'political questions' that are, by their nature, beyond the scope of judicial review.").

[140] *Blaisdell*, 290 U.S. at 437.

[141] Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S.

array of topics addressed by a state's police power, its use is a daily activity.

The fact that a state's police power is used more regularly than the federal government's war power may support the view that its use should be subjected to closer judicial scrutiny. The argument would be that because a state's use of the police power is an everyday occurrence, it is more susceptible to improper use and more likely to result in the erosion of individual rights. This argument is similar to Justice Jackson's concern with "the tendency of a principle to expand itself to the limit of its logic."[142] Any act carried out under the guise of the police power that goes beyond what is allowed under normal conditions would present the opportunity for an unscrupulous leader to take advantage and claim a power supported by a judicial confirmation of its legitimacy.[143] The risk is greater in the police power context than in the war power context because the actor would receive judicial approval for an exercise of a power that is used with more regularity than the war power.

However, in the context of an emergency power, the power is constrained by definition, regardless of whether it is the federal government's war power or the state's police power.[144] The issue is far removed from a state's everyday use of the police power because the emergency measures are by definition temporary.[145] By its very

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186, 192 n.5 (1968) (quoting Munn v. Illinois, 94 U.S. 113, 145 (1877)); *see also* The Slaughter-House Cases, 83 U.S. 36, 62 (1872) (The police power of a state "is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.").

[142] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1949)).

[143] *See* Ferejohn & Pasquino, *supra* note 138, at 219 ("[T]he laws made to deal with the emergency may become embedded in the normal legal system, essentially enacting permanent changes in that system under color of the emergency. Liberties won slowly over long periods of time may be subject to rapid erosion in emergencies and these new restrictions, if they are embedded in law, may not be rapidly restored if they are restored at all.").

[144] Similarly, the furthest extent of the federal government's war power was considered, by at least one Justice, to be at issue in *Hirabayashi*. *Hirabayashi*, 320 U.S. at 111 (Murphy, J., concurring) ("In my opinion this goes to the very brink of constitutional power.").

[145] *See, e.g.*, *Blaisdell*, 290 U.S. at 416 (the statute was due to expire when the emergency ceased); Smith v. Avino, 91 F.3d 105, 108 (11th Cir. 1996), *rev'd on other grounds*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (the curfew was adjusted as the recovery progressed); Moorhead v. Farrelly, 723 F. Supp. 1109, 1111 (D.V.I. 1989). I acknowledge that this topic touches closely on the much-debated issue of whether the laws are or should be somehow suspended or altered to respond to an emergency. But, to be sure, the issue is not a new form of power or law, but rather, the furthest permissible extent of the existing power brought about by the most extreme circumstances to justify its use. *See, e.g.*, Ackerman, *supra* note 48; Dyzenhaus, *supra* note 139; Ferejohn & Pasquino, *supra* note 138; Gross, *supra* note 16; Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

nature, an emergency is constrained by time and circumstances, and likewise "the duration of the remedy is limited . . . by the duration of the disease."[146] The purpose of the emergency measure is to return the state of things to normalcy, and the aim is that the "temporary nature of emergency legislation will prevent it from corrupting the normal legal system."[147] Thus, regardless of the claimed power—war or police—the ultimate issue is the duration of the surrounding circumstances that justify the action. In such a situation, the everyday exercise of the governmental power is a non-issue because it is the rarity of the occasion that creates and defines the scope of the emergency measure.

Under the Process-Reasonableness test, the reasonableness analysis constrains the possible extension of an emergency power to regular non-emergency government action. For example, if a state legislature enacted a statute that gave the governor the authority to order the forced evacuation of any city at any time, and the governor acted on that authorization on a normal Tuesday afternoon, the evacuation would almost certainly be challenged as an unconstitutional infringement of numerous individual rights. If the governor argued that he or she was acting with the express authorization of the legislature, and was therefore well within the state's emergency powers when acting on that authorization, the governor would prevail on the Process Prong of the test. The governor, however, would almost certainly fail the Reasonableness Prong without a recognized emergency to back up the action.

One of the two questions that the courts consider under the Reasonableness Prong is whether an emergency actually exists. In all of the cases discussed above, the challengers never seriously contested the existence of the emergency because the government's action was in response to unquestionable circumstances of war, economic depression, or natural disaster.[148] The lack of a challenge to the existence of an emergency implicitly supports the reasonableness of the government's use of its emergency power. In the absence of an emergency, or if the existence of an emergency is arguable, the strength of the government's position is drastically weakened. Further, the government is more likely to encounter persuasive arguments that its action was pretextual if it was not supported by the existence of an actual emergency. Simply put, it is unreasonable to claim an emergency power when there is no emergency.

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[146] Kahan, *supra* note 8, at 1293.

[147] Ferejohn & Pasquino, *supra* note 138, at 219 (describing the "negative belief" of the legislative emergency power model).

[148] *See supra* note 25.

At this point in my argument it is sufficient to say that the power at issue should not and, moreover, cannot be the reasoning behind an elevated standard of judicial review for state government emergency actions following natural disasters. That is to say, if the Court applies the Process-Reasonableness test to review the federal government's use of its war power, then it cannot justify a more probing inquiry into a state government's use of its police power solely based on the nature of the two powers. Each power is inherently vague in order to ensure that the government has discretion to deal with emergencies. Also, each power is constrained by the time and circumstances defining its use. Thus, the distinction between the federal government's war power and the state government's police power cannot be relied on to support an argument for a higher standard of scrutiny for the latter.

B. The Representative Capacities of Congress and State Legislatures

One objection to the courts applying the same standard to challenges of both federal and state emergency powers could be based on the inherent differences between the representative capacities of Congress and state legislatures. Congress, as a legislative body, represents the collective will of the people of the United States. State legislatures, by contrast, only represent the collective will of the people of their state. The argument against the use of the same standard for both federal and state emergency powers based on this simple distinction is as follows: the Process-Reasonableness test allows for the legislative body to consent to a trade-off of constitutional liberty for the return of social order, because emergency powers are drastic actions implicating federal constitutional rights, Congress is better suited than state legislatures to determine when constitutional rights may be traded-off.

A point of clarification is necessary prior to discussing this distinction. Emergency powers do not implicate a "waiver" of constitutional rights. The limitations on individual rights are not newly created by an emergency, and are not temporarily waived by an emergency. This was the position of Chief Justice Chase in *Milligan*,[149] as well as the Court in *Blaisdell* when it observed that:

> [G]rants of power to the federal government and . . . limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency . . . . While emergency does not create power, emergency may furnish the occasion for the exercise of power . . . "emergency

[149] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

> may afford a reason for the exertion of a living power already enjoyed."[150]

"Police power is inherent in the sovereignty of every state and is reserved to the states through the Tenth Amendment."[151] David G. Tucker and Alfred O. Bragg, III argue that "[t]he police power is a source of power available to local governments under which, in an emergency situation, they may take extraordinary action to protect the public."[152] An inherent characteristic of the police power is that its use implicates a restriction on individual rights.[153] State legislatures make the determinations as to acceptable trade-offs of liberty with every invocation of their police power.[154] The courts have long accepted that the states possess the power to determine whether a trade-off in individual rights to protect the public good is necessary. Therefore, it is possible to conclude that state and local governments are just as ably suited, if not more so, than Congress to determine whether a trade-off in liberty for the public good is acceptable. Thus, a court cannot justify a more probing inquiry into the state government's use of its police power based on the representative capacity of the legislative body consenting to the trade-off in liberty.

C. Emergency Rationale

There are two primary rationales that justify a government's response to an emergency: relief and prevention.[155] Relief focuses on caring for the victims and restoring order.[156] Prevention addresses the cause of the emergency and preventing a repeat occurrence.[157]

The response to each form of emergency—natural disaster, economic crisis, and war—implicates each rationale. In the natural disaster context, relief is the primary focus.[158] Assisting those that have been harmed is at the forefront of the governmental response; preventing future devastation is a secondary concern in the natural disaster context. Conversely, in times of war prevention is the primary focus. The government's primary concern is to identify the attacker;

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[150] *Blaisdell*, 290 U.S. at 425–26 (quoting Wilson v. New, 243 U.S. 332, 348 (1917)).

[151] Tucker & Bragg, *supra* note 8, at 840 (citing Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919)).

[152] Tucker & Bragg, *supra* note 8, at 850.

[153] *See* 16A C.J.S. Constitutional Law § 611 & nn.16–22 (2005).

[154] *Id.*

[155] Ackerman, *supra* note 48, at 1057.

[156] *Id.* (explaining when the relief rationale is appropriate).

[157] *Id.* at 1058.

[158] *Id.* at 1057 ("The relief rationale conceives of the emergency in a technocratic spirit . . . . The model here is provided by the countless statutes dealing with 'states of emergency' generated by natural disasters.").

addressing the harm that has already been done, although an issue of great national interest and social concern, is secondary.

Using the events of Hurricane Katrina as an example, the political finger pointing following the hurricane was based on the government's delay in providing relief.[159] The people of New Orleans were dubbed "refugees," seeking shelter and food, and the response effort was directed, although in this instance inefficiently, at easing their plight. In the future, government officials will turn their attention to how the flooding could have been prevented and what steps need to be taken to prevent a reoccurrence of the massive destruction caused by the broken levees.[160]

In contrast, and using the events of 9/11 as an example, in times of war, governmental response centers on identifying the cause and preventing future attack. The nation was certainly concerned with the plight of the families of those who died in the 9/11 attacks. However, the government's response was almost immediately directed at identifying Osama Bin Ladin and his al-Qaeda network as the cause, and subsequently declaring a "war on terror" to prevent future attacks. Thus, although relief was a concern following the 9/11 attacks, the government immediately focused on identifying a "them," and the prevention rationale.

The prevention rationale is problematic because during wartime, "emergency powers are often perceived as directed against a clear enemy of 'others.'"[161] In the context of an emergency instigated by war, there exists a conception of "them" as the wrongdoers and "us" as the innocent victims.[162] It is within this "us" versus "them" context that "[w]e allow for more repressive emergency measures" because "we believe that we are able to peek beyond the veil and ascertain that such powers will not be turned against us."[163]

The perception of a "them," however, is lacking in the natural disaster context because the "attacker," i.e., nature, cannot be targeted in any meaningful way. The concern that a state government will use the

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[159] *See* Bumiller, *supra* note 8; Dao, Treaster & Barringer, *supra* note 4; Purdum, *supra* note 8; Saulny, *supra* note 9.

[160] *See* Treaster & Kleinfield, *supra* note 2. Preventing and mitigating the effects of a natural disaster is one of the Federal Emergency Management Agency's (FEMA) most significant roles. *See* Tucker & Bragg, *supra* note 8, at 838.

[161] Gross, *supra* note 16, at 1082.

[162] *See id.* at 1084 ("Stereotyping often is employed with respect both to insiders and outsiders, emphasizing good, noble, and worthy attributes of the former, and negative traits of the latter.").

[163] *Id.* at 1083 (using increased approval of racial profiling to identify potential terrorists following 9/11 as an example). *But see* Kahan, *supra* note 8, at 1297 (arguing that "because an economic crisis does not arise against a nameable enemy, there is little ideology to restrain the hand of the government from unconstitutional crisis action") (footnote omitted).

emergency situation to pray on the fears of the public and take "more repressive emergency measures" than are absolutely necessary is diminished because there is not a "them" to target.

A comparison of the aftermath of Hurricane Katrina and the federal government's actions during World War II and following September 11 aptly demonstrates the danger created by the identification of a "them" that is not present in the context of a natural disaster. Mayor Nagin's orders were inclusive of the entire city and all persons that remained within it.[164] His orders were directed at restoring order and providing relief to the people that were trapped in the chaos resulting from the devastation. His orders could not target a "them" to prevent future devastation because nature cannot be prevented from reoccurring. This was never more evident than when Hurricane Rita struck the city just a little less than month after Hurricane Katrina.[165]

In contrast, following 9/11 the federal government has used racial and ethnic profiling, specifically of Arab-looking men at airports, as a method of preventing future attacks.[166] The American public accepts racial profiling because most Americans "[are] not the intended targets and their rights [are] unlikely to be infringed."[167] Thus, the prevention of another attack is viewed as a justifiable trade-off for the infringement of the rights of "them." Similarly, the orders at issue in the Japanese internment cases were explicitly directed at people of Japanese ancestry because Japan attacked Pearl Harbor and there was fear of future sabotage and espionage.

Natural disasters are no more Japanese than they are Anglo-Saxon. Following a natural disaster, the government's focus is on relief and a natural disaster is not readily susceptible to the same oppressive abuses attributable to war. Therefore, state government emergency power following natural disasters should not be held to a higher standard than federal government emergency power during war.

This is not to say that the aftermath of a natural disaster is free from the possibility of political corruption, because "whether emergency measures triggered by natural disasters may be abused by unscrupulous leaders" remains open to debate.[168] The complaint filed by

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[164] *But see* Complaint ¶ 33, Nat'l Rifle Ass'n of Am. v. Nagin, Civ. No. 05-04234 (E.D. La. Sept. 22, 2005) (alleging that "wealthy persons" were omitted from Mayor Nagin's firearm order).

[165] Hurricane Rita came ashore on September 23, 2005. *See* Simon Romero & Jere Longman, *Storm Lashes Coast; Levees Breached in New Orleans: Path Veers East Threatening Oil Plants*, N.Y. TIMES, Sept. 24, 2005, at A1.

[166] Gross, *supra* note 16, at 1083.

[167] *Id.*

[168] Jon Elster, *Comments on the Paper by Ferejohn and Pasquino*, 2 INT'L J. CONST. L. 240, 241 (2004).

the NRA and Buell O. Teel, for example, alleges that Mayor Nagin's orders were applied based on socioeconomic status.[169] Further, many are concerned that the rebuilding effort in New Orleans will exclude lower income residents.

Political corruption is a justifiable argument against a lenient standard of review of state emergency actions after a natural disaster. And, inasmuch as the Process-Reasonableness test accounts for political corruption by inquiring into whether the actions were pretextually motivated, an even more lenient standard is not justified. An argument could be made that because state actions following a natural disaster are less likely to be used for politically corrupt purposes, they should be satisfied by a less probing inquiry or require a higher standard of proof than pretextual motive. One example of a higher standard of proof would be for the courts to review a state government's action for malice toward a particular group of people. Although similar to reviewing for pretextual motive, proving that a state government actually intended a harmful effect on the subject classification would be more difficult than showing that the action was aimed at a particular group without regard for intent to harm.

The question, however, is why would a higher standard be necessary for state government actions? As the decisions in *Hirabayashi* and *Korematsu* more than aptly demonstrate, when reviewing for pretext, the Court's analysis is nothing if not lenient No emergency action has ever been held unconstitutional because it was pretextual. An even more lenient standard of review may be too enticing to the leader that shuns the admonition that absolute power corrupts absolutely. Equally, an even more lenient standard may not account for the continued existence of "unscrupulous leaders." Thus, although concern for state governments overreaching under the prevention rationale following natural disasters is diminished, it is not apparent why state action should receive a lower standard of review than federal action. Understandably, this discussion could be used to argue for stricter judicial scrutiny of federal emergency actions, but that is not the focus of this Note.

In sum, social support builds in favor of governmental action during wartime due to the perception of an enemy, which in turn provides a greater opportunity for abuse of the emergency power. Following a natural disaster, however, there is a decreased fear of abuse of the emergency power by the local government because there is no identifiable enemy. Thus, the judicial review of a local

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[169] Complaint ¶¶ 31–34, Nat'l Rifle Ass'n of Am. v. Nagin, Civ. No. 05-04234 (E.D. La. Sept. 22, 2005).

government's emergency measures should, at a maximum, be the same as that applied to the federal government's use of its war power. There is, however, no justifiable reason to impose a higher standard of proof or more lenient judicial review of state action than the already lenient Process-Reasonableness test.

D. Conclusion

Although the distinctions discussed above may weigh in favor of either a more lenient standard of review or a higher standard of proof, none of the distinctions give a justifiable reason why a state government should receive more favorable treatment following a natural disaster. The courts' Process-Reasonableness test is built on the premise that the politically accountable branches should remain in control of the policy decisions as long as they have reasonable motives. Because the courts avoid making policy judgments concerning emergency measures, the burden on the political branches to support their actions is near the ground, and it is not apparent what benefit would accrue to the state governments from an even more lenient standard. At best, the distinctions discussed above lead to the conclusion that a state government is less likely to abuse its emergency power than the federal government, but that conclusion does not mean a state government will never abuse its power. A more lenient standard would do nothing other than open the door for abuse, and since no benefit accrues to the state government, that door should remain closed (or at least as closed as it currently is).

III. MAYOR NAGIN'S ORDERS: AN OPINION

This Note was instigated by the questionable constitutionality of Mayor Nagin's orders following Hurricane Katrina. The intent has never been to assert that a particular method of review is the best method to reach a determination of that issue. Rather, this Note sought to determine what method is used in current practice. To that end, this Note has argued that the Process-Reasonableness test is the method that present-day courts apply to challenges of state or local officials' use of emergency powers following natural disasters. This Note now considers how the Process-Reasonableness test may resolve challenges to Mayor Nagin's evacuation and firearms orders. Ultimately, Mayor Nagin's evacuation order was likely constitutional, while his firearms order was likely unconstitutional under certain circumstances.

A. Mayor Nagin's Evacuation Order

A claimant challenging Mayor Nagin's evacuation order would quickly lose the process analysis. The Louisiana Legislature conferred to the chief executive officer of a municipality the power to "[d]irect[] and compel[] the evacuation of all or part of the population from any stricken or threatened area within the municipality if he deems this action necessary."[170] Plainly, the legislature explicitly gave Mayor Nagin the discretion to compel an evacuation. Thus, the politically accountable branches—the legislature and Mayor Nagin—authorized the evacuation and the Process Prong is satisfied.

The reviewing court must then address the Reasonableness Prong. Mayor Nagin's judgment that the use of the police power was necessary was justified by the circumstances the city faced. Parties challenging Mayor Nagin's evacuation order would not be credible if they contend that an emergency did not in fact exist within the City of New Orleans. A court hearing such a claim is likely to take judicial notice of the emergency.[171]

The uncontestable existence of an emergency created by Hurricane Katrina greatly shifts the argument in favor of the government. Mayor Nagin would most likely argue that due to the scarcity of available food and drinking water, as well as fear of gas leaks, fires, toxic water, and diseases spread by mosquitoes, his mandatory evacuation order was necessary to restore order.[172] The claimants may respond with plausible arguments that they were well situated with enough food and drinking water, medically trained and capable of understanding the health risks involved, and acted to the benefit of the recovery by preventing looting and beginning the clean-up of neighborhoods.[173] The claimants' arguments, however, would not negate the existence of the emergency created by the disorder and chaos within the city.

The court must still review for pretextual motive. The court reviewing a challenge to Mayor Nagin's evacuation order may rely on

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[170] LA. REV. STAT. ANN. § 29:727(F)(5) (2006). The term "Parish President" includes the Mayor of New Orleans as defined by statute. *Id.* § 29:723(5).

[171] *See* Moorhead v. Farrelly, 723 F. Supp. 1109, 1110 (D.V.I. 1989) (taking judicial notice of the continued devastation on the island of St. Croix); *supra* notes 120–21 and accompanying text.

[172] Jere Longman & Sewell Chan, *Flooding Recedes in New Orleans; U.S Inquiry Is Set*, N.Y. TIMES, Sept. 7, 2005, at A1.

[173] *See* Berenson, *supra* note 11 (reporting that holdouts on dry ground expressed their desire to stay because they were taking proper health precautions and "hoped to find a job as the city's cleanup progressed"); Alex Berenson, *Holdouts on Dry Ground Say, "Why Leave Now?"*, N.Y. TIMES, Sept. 9, 2005, at A1 (reporting that holdouts described their efforts to aid in the recovery by helping to rescue people and deter further looting in their neighborhoods).

Korematsu as authority for upholding the wholesale evacuation of all persons whether or not they were determined to be looters. The *Avino* Court, as noted above, relied on *Korematsu* as authority for the imposition of the curfew following Hurricane Andrew.[174] The *Korematsu* Court upheld the reasonableness of the evacuation and internment of people of Japanese ancestry because of the difficulty in discerning whether each individual person was loyal to the United States.[175] Similarly, Mayor Nagin's order could be upheld based on the difficulty in discerning whether each individual intended to aid in the recovery or hinder the recovery by looting. The distinction between *Korematsu*'s conclusion and Mayor Nagin's evacuation order, however, would be in the reasonableness analysis. The *Korematsu* Court failed to recognize the pretexual motive behind the curfew and relocation orders. Mayor Nagin's order is unlikely to present a similar concern because it was not aimed at a specific area or group of individuals; rather it was inclusive of the entire city distinctly without concern for specific areas or groups of individuals.

B. Mayor Nagin's Firearm Order[176]

Mayor Nagin's order for police to take possession of any firearm, lawfully possessed or not, was likely beyond his authority, in at least some instances. In the same statute authorizing Mayor Nagin's evacuation order, the legislature authorized him to "suspend or limit the sale, dispensing, or transportation of . . . firearms."[177] A court reviewing a challenge may look at the intent of the legislature to determine whether it intended for the statute to authorize police to take lawfully possessed firearms from individuals.[178]

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[174] Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996), *rev'd on other grounds*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

[175] Korematsu v. United States, 323 U.S. 214, 218–19 (1944). *See also Ex parte* Endo, 323 U.S. 283, 297 (1944) (holding the continued detention of Japanese that the government conceded to be loyal to the United States as outside the intended purpose of the evacuation and detention ratified by Congress).

[176] The NRA reached a settlement with New Orleans and arranged for the return of firearms seized following Hurricane Katrina. *See* National Rifle Association of America, Institute for Legislative Action, *NRA and New Orleans Reach Agreement on Return of Firearms Confiscated During Katrina*, Mar. 16, 2006, http://www.nraila.org/CurrentLegislation/Read.aspx?ID=2057.

[177] LA. REV. STAT. ANN. § 29:727(F)(8) (2006).

[178] The *Hirabayashi* Court conducted a similar inquiry to determine whether Congress's ratification included consideration of a curfew order. Hirabayshi v. United States, 320 U.S. 81, 89–91 (1943). The Court concluded that the curfew order, although not explicitly listed in either Executive Order 9066 or Congress's ratification, was within the scope of the authorization because "the legislative history demonstrates that Congress was advised that curfew orders were among those intended." *Id.* at 91 (construing Exec. Order No. 9066, 3 C.F.R. 1092 (1942)).

Mayor Nagin may argue that his firearm order was consistent with the provision of the statute permitting him to suspend the transportation of firearms. In that regard, claimants may be divided into two classifications: 1) claimants, like Buell O. Teel, who had firearms taken from them as they traveled throughout the city;[179] and 2) claimants who had their firearms taken from them inside a residence.[180]

Claimants who were within a residence have a much stronger argument that they were not transporting their firearms, and therefore the statute does not authorize the confiscation of their lawfully possessed firearms. Mayor Nagin may respond by arguing that an explicit authorization of his firearm order is not required. He may rely on the *Hirabayashi* Court's conclusion that Executive Order 9066 and Congress's ratification authorized the curfew order despite the lack of reference to curfew restrictions within their text.[181] He would argue that the legislature's intent was to allow the restoration of order by taking firearms, and the statute should not be so narrowly interpreted as to defeat that purpose.

General principles of statutory construction, however, conflict with this argument. The statute enumerates specific situations when lawfully possessed firearms may be confiscated during an emergency. By negative implication, the enumerated list indicates that the legislature considered several situations when citizens may possess firearms during an emergency. The legislature chose to create a limited list instead of an expansive general provision providing for the confiscation of lawfully possessed firearms. Congress' ratification in the Japanese internment cases, by contrast, included the expansive "any act" language that allowed the Court to find an implicit authorization of the curfew order.[182] Without an expansive provision, the court cannot find implicit authorization beyond the specifically delegated situations, and Mayor Nagin's firearms order, as applied to claimants who were within a residence, is beyond the legislature's authorization.

Mayor Nagin could argue that the legislature's underlying motivation when creating the statute was to allow for the restoration of order, and his order was necessary to achieve that end. This argument, however, would fall on deaf ears. The courts do not concern them-

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[179] Complaint ¶ 19, Nat'l Rifle Ass'n of Am. v. Nagin, Civ. No. 05-04234 (E.D. La. Sept. 22, 2005), available at http://www.saf.org/new.orleans.lawsuit/complaint.declaratory.injunctive.relief.pdf.

[180] *Id.* ¶ 16.

[181] Executive Order 9066 authorized the restriction of "the right of any person to enter, remain in, or leave" and Congress's ratification provided for punishment of anyone who "shall enter, remain in, leave, or commit any act." Exec. Order No. 9066, 3 C.F.R. 1092 (1942), *quoted in Hirabayashi*, 320 U.S. at 86–87.

[182] *Hirabayashi*, 320 U.S. at 87.

selves with policy or means-ends analysis when determining whether the Process Prong has been satisfied. Thus, regardless of whether Mayor Nagin's firearm order was necessary, his order still lacks legislative authorization. Assuming there are no other facts that may place the resident-claimants within the framework of the statute, the firearm order fails the Process Prong as applied to claimants who were within a residence, and the court must declare it unconstitutional.

Claimants, such as Buell O. Teel, who had firearms taken from them while traveling throughout the city, may have to argue against the reasonableness of the order because a court could determine that they were transporting firearms within the meaning of the statute. Again, the claimants would have to concede to the existence of an emergency created by Hurricane Katrina. The claimants' best argument may rest on the fact that, in taking their firearms, the government was leaving them at a greater risk to be victimized by looters. They may argue, as Buell O. Teel asserts in his complaint, that they had their firearms for protection from looters and were, therefore, put at an unreasonable risk by Mayor Nagin's firearm order.[183] However, Mayor Nagin would argue that the police were instructed to err on the side of caution and take firearms from everyone that remained within the city in order to protect the police officers and recovery workers alike. Thus, there was no pretext and the order was simply an efficient method of protecting officers and recovery workers.

In its complaint, the NRA asserts an equal protection claim that may provide the basis for a pretexual motive argument.[184] The complaint states that the firearm order was not applied to "wealthy persons" that were able to "keep . . . and/or to retain armed private security personnel to protect their more expensive homes and properties."[185] If the NRA is able to link Mayor Nagin to a pretextual motive to allow "wealthy persons" to retain their guns, e.g., forcing lower-class persons out of the city so that only higher-class persons will remain when the city is rebuilt, then the court must find that the order was unreasonable and therefore unconstitutional.

CONCLUSION

This Note's aim was twofold: (1) to set out the standard of review that the courts apply to challenges of state emergency power following natural disasters; and (2) to determine how that standard would

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[183] Complaint ¶ 13, Nat'l Rifle Ass'n of Am. v. Nagin, Civ. No. 05-04234 (E.D. La. Sept. 22, 2005).

[184] *Id.* ¶¶ 31–34.

[185] *Id.* ¶ 33.

resolve challenges to Mayor Nagin's orders following Hurricane Katrina. The Process-Reasonableness test is a deferential test that allows the politically accountable branches wide latitude to address the unpredictable situations created by emergencies. A court's first step is the Process Prong, where it analyzes whether the politically accountable branches authorized the challenged action. Next, a court must resolve the Reasonableness Prong by asking whether an emergency actually existed and whether the government's action had a prextual motive. If the politically accountable branches authorized the action, an emergency existed, and their action was not pretextual, then the government's action was constitutional.

Mayor Nagin's evacuation order passes the Process-Reasonableness test. Louisiana law explicitly authorizes Mayor Nagin to compel evacuation, Hurricane Katrina created an unquestionable emergency, and there is no evidence of a pretextual motive. Accordingly, a court hearing a challenge to the evacuation order must find that the order is constitutional. Mayor Nagin's firearm order, however, is not as successful. Whether Mayor Nagin's firearm order fails the Process Prong of the test depends on whether a claimant's firearm was taken from him or her within a residence.[186] If the Process Prong is satisfied, the Reasonableness Prong is satisfied because Hurricane Katrina created an emergency, and there is no evidence of pretext.

Once again, the argument here is not that the Process-Reasonableness test is the standard that courts *should* apply. Rather, this Note argues that the Process-Reasonableness test is the standard that the courts *do* apply to federal government emergency actions and courts *should* apply the same standard to state government actions following a natural disaster. Applying the Process-Reasonableness

[186] The NRA has taken great strides to prevent an order similar to Mayor Nagin's firearm order from passing the Process Prong. The NRA has backed legislation in Idaho, Louisiana, Mississippi, Tennessee, and Virginia to explicitly prohibit state executives from confiscating firearms from citizens in times of emergency. *See* S.B. 1401, 58th Leg., 2d Reg. Sess. (Idaho 2006); S.B. 93, 2006 Leg., Reg. Sess. (La. 2006); H.B. 36, 2006 Leg., Reg. Session (La. 2006); H.B. 136, 2006 Leg., Reg. Sess. (La. 2006); H.B. 172, 2006 Leg., Reg. Sess. (La. 2006); H.B. 760, 2006 Leg., Reg. Sess. (La. 2006); H.B. 1141, 2006 Leg., Reg. Sess. (Miss. 2006); S.B. 2928, 2006 Leg., Reg. Sess. (Tenn. 2006); H.B. 1265, 2006 Leg., Reg. Sess. (Va. 2006).

test, Mayor Nagin's orders were constitutionally permissible, with the exception of taking firearms from people within their residences.

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